



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 18, 2022

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BOARD DECISIONS

Appellant: Mark Abernathy
Agency: Department of the Army
Decision Number: [2022 MSPB 37](#)
Docket Number: DC-1221-14-0364-W-1
Issuance Date: November 15, 2022

WHISTLEBLOWER PROTECTION ACT- COVERAGE

The appellant, a Federal contractor, filed an individual right of action (IRA) appeal alleging that, in retaliation for his reporting the agency's misappropriation of funds to the Office of the Inspector General in August 2012, the agency failed to select him from amongst the applicants for a September 2012 vacancy announcement. The agency contended that the appellant's disclosure was not protected under 5 U.S.C. § 2302(b)(8) because he was neither an employee, nor an applicant, at the time he made it. It also argued that its failure to refer the appellant to the selecting official for the position in question was not a personnel action that could form the basis of an IRA appeal. The administrative judge found unavailing the agency's argument that its actions could not constitute a personnel action under the statute; however, she nonetheless dismissed the matter for lack of jurisdiction because of the appellant's non-employee/non-applicant status at the time of his

disclosure. The appellant filed a petition for review arguing that the Board has jurisdiction over the matter. The agency filed a cross petition for review arguing that the administrative judge erred in finding that the appellant had alleged a covered personnel action. The Board granted the appellant's petition for review, denied the agency's cross petition for review, vacated the initial decision, and remanded the matter for further adjudication.

Holding: The appellant's disclosures were not excluded from whistleblower protection simply because he was neither a Federal employee, nor an applicant for Federal employment, when he made them.

1. The Board reasoned that there was no basis to overturn prior Board precedent, i.e., *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶¶ 8-12 (2010), and *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶¶ 8-9 (2007), which found that, at the time a disclosure is made, an individual need not be an employee or applicant for employment at the agency that took the alleged retaliatory action in order to qualify for whistleblower protection under the statute.
2. The Board stressed that its finding was not limited to Federal contractors; rather, it was applicable to any individual who makes a whistleblowing disclosure at any time before becoming a Federal employee or applicant for employment.
3. The Board explained that a statutory provision that went into effect after the close of the record on review, i.e., 5 U.S.C. § 2302(f)(1)(F), clarified that its interpretation of the prior statutory language was correct; however, the Board reasoned that it need not determine whether the new provision was applicable to the instant appeal as it was not material to the outcome.

Holding: The appellant established Board jurisdiction over his IRA appeal.

1. The Board found unavailing the agency's argument that its failure to refer the appellant to the selecting official was not a personnel action, reasoning that an "appointment" is among the personnel actions specifically enumerated in the statute.
2. The Board concluded that the appellant satisfied the remaining jurisdictional criteria.

COURT DECISIONS

NONPRECEDENTIAL:

Durr v. Merit Systems Protection Board, No. [2022-1072](#) (Fed. Cir. Nov. 15, 2022) (CH-4324-17-0324-M-1) The court affirmed the Board's decision, which dismissed Mr. Durr's Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) appeal as barred by the doctrine of laches. The court found that the Board did not abuse its discretion, reasoning that Mr. Durr had waited over 20 years after his removal from Federal service to file his USERRA appeal. The court also found that substantial evidence supported the Board's conclusions that (1) Mr. Durr's mental conditions were not severe enough to account for his extensive filing delay and (2) the lengthy delay was prejudicial to the agency.

Bennett v. Department of Commerce, No. [2022-2004](#) (Fed. Cir. Nov. 15, 2022) (DC-0752-21-0142-I-1) The court transferred this mixed-case appeal to the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1631.

Delgado v. Department of Justice, No. [2022-1988](#) (Fed. Cir. Nov. 17, 2022) (NY-1221-09-0299-X-1) The court found that the record supported the Board's conclusion that the agency had complied with the terms of the parties' settlement agreement; accordingly, it affirmed the Board's decision. The court also found that the Board had correctly rejected Mr. Delgado's requests for monetary and non-monetary benefits that were outside the scope of the parties' agreement, explaining that the Board lacks the statutory authority to award the same.

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